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No. 88-596

IN THE

Supreme Court of the United States

October Term, 1988

COUNTY OF SUMMIT,
Petitioner,

vs.

CITY OF AKRON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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I.

QUESTIONS PRESENTED

1. Whether this Court will review a decision of a state court on grounds neither presented to nor decided by the state court.

2. Whether a municipality may assert a Fourteenth Amendment equal protection claim against another municipality from which it purchases water pursuant to a written contract.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves a contract dispute between two municipal government entities in the State of Ohio.

The City of Akron operates a water system. Under Ohio law it has no obligation to sell water to any purchaser outside the city (Pet. App. at 1a). The City of Akron agreed to sell water to two other municipal

entities. In one instance the City of Tallmadge purchases its water from Akron on an open market basis with no guarantees of a continued supply, of a controlled price or of any particular terms of sale. In the other instance the petitioner, Summit County, negotiated for and obtained a long-term contract with Akron under which it has secured a continuing water supply for years with a fixed rate schedule. The contract rate to Summit County has always been higher than the open market price to the City of Tallmadge. Summit County has challenged its contract rate in this case.

The trial court made unchallenged findings that "The City of Akron engaged in no unscrupulous, excessive, or immoderate conduct in the negotiation or enforcement of the subject contract" (App. at A2, ¶10) and that "The County was not forced to sign the 1979 water agreement against its will or better judgment" (*id.* at ¶6). The trial court also made a finding, affirmed on appeal without further review, that "The rates charged by the City of Akron to the County of Summit for water are not unreasonable" (*id.* at ¶11; 468 N.E.2d 927, 930 ____ [1983]). The trial court was, therefore, also able to make consistent unchallenged conclusions of law that "The contract was not entered into under duress by either party" and that "Neither the negotiation process or [sic] the contract itself are [sic] unconscionable" (App. at A3, ¶¶3, 5).

There is no dispute that Ohio law provides that rates charged by a municipality for water must be reasonable and must not unjustly discriminate among the customers served, taking into account the customers' situations and classifications.[1] With a conclusive determination that the rates were reasonable, the *only* substantive issue

[1] *State, ex rel. Mt. Sinai Hospital, v. Hickey*, 30 N.E.2d 802 (Ohio 1940); *Orr Felt Co. v. Piqua*, 443 N.E.2d 521 (Ohio 1983).

presented to the Supreme Court of Ohio was one of state common law, namely whether the difference between the open market rate to one customer and the long-term contract rate to another was an unjust discrimination. That court held that freely negotiated, reasonable contract rates "will not be struck down as discriminatory" as a matter of state law, and it reversed the lower court on that ground.

Summit County had not sought to affirm the lower court on the basis that a reversal would constitute a denial of equal protection. No constitutional question was either briefed or argued. Instead, the petitioner briefed and argued only four propositions in the Supreme Court of Ohio. The first was a procedural point concerning the prior appeals in the lower courts, and all three of the other arguments addressed the discrimination issue as a matter of state common law.

Following the Supreme Court of Ohio's decision (Pet. App. at 1a) and entry of judgment (Pet. App. at 13a), Summit County for the first time sought to have that Court consider an equal protection argument by filing a Motion for Rehearing (Pet. App. at 15a). Rehearing was summarily denied (Pet. App. at 14a), and, as a consequence, the dilatory constitutional issue was not addressed on the merits. The petitioner now seeks to have this Court agree to review an issue that was never properly before the court to which the writ would be issued.

SUMMARY OF ARGUMENT

This Court is without jurisdiction to hear petitioner's federal equal protection claim because petitioner did not properly raise that issue in the state court below nor did that court address the issue. This Court has long maintained that it will not decide federal questions which are not presented to or decided by the highest state court.

In addition to the jurisdictional deficiencies, petitioner has failed to premise its argument on any recognized constitutional right. It is well-established that a municipality has no Fourteenth Amendment rights against its creator state, and likewise it has no Fourteenth Amendment rights against another political subdivision of that state. This conclusion is not in conflict with any prior decision of this Court or of any other federal or state court.

REASONS FOR DENYING THE WRIT

I. The Federal Question Which Petitioner Seeks to Present for Review by This Court Was Not Considered or Decided by the Supreme Court of Ohio.

Petitioner contends that the Supreme Court of Ohio's decision below is in conflict with the equal protection clause of the Fourteenth Amendment. Petitioner has accordingly sought to invoke this Court's jurisdiction under 28 U.S.C. §1257, which provides that a final judgment of the highest court of a state may be reviewed by the Supreme Court by writ of certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States." In accordance with long established precedent, this Court should decline to accept jurisdiction because the Supreme Court of Ohio never considered petitioner's constitutional claim, nor was it given a proper opportunity to do so.

Although the petitioner referred to an equal protection issue in the lower courts of Ohio, the case was ultimately decided at both the trial court and intermediate appellate court on state law principles. On respondent's motion to certify the record in the Supreme Court of Ohio, no state or federal constitutional question was suggested by either party. Following that court's certification, both parties confined their briefs and oral arguments to issues of state common law, and petitioner made no claims or assertions under the Fourteenth Amendment. In reaching its decision, the Supreme Court of Ohio resolved questions of state law only and, quite understandably, did not address any hypothetical state or federal constitutional questions that neither party had presented.

Having chosen unsuccessfully to rely on its erroneous view of state law and to forego an argument based on constitutional limitations, petitioner then sought a rehearing on the previously omitted grounds that the rate differential between Summit and Tallmadge is violative of the equal protection clause of both the Fourteenth Amendment and the Ohio constitution. The court summarily denied the motion for a rehearing. Petitioner is now attempting to characterize the denial of rehearing as if the court had explicitly declined to address constitutional arguments presented in a timely manner.

This Court has consistently adhered to the principle that it is without jurisdiction to decide federal constitutional issues which have not been adequately presented in the state system. *See, e.g., Heath v. Alabama*, 106 S. Ct. 433, 436 (1985); *Webb v. Webb*, 451 U.S. 493, 496 (1981); *Tacon v. Arizona*, 410 U.S. 351 (1973); *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Whitney v. California*, 274 U.S. 357, 360 (1927); *State v. Rinehart*, 283 N.W.2d 319 (Iowa), *cert. denied*, 444 U.S. 1088 (1979). In addition to the jurisdictional statute, 28 U.S.C. §1257, there are sound reasons for this limitation. It requires the parties to develop a sufficient record, and if there are independent state grounds to pretermit the federal issue, the state court can identify and act upon them in an authoritative manner. This Court has additionally explained that:

> If the parties to state court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our workload this is a very substantial matter.

Webb v. Webb, supra, 451 U.S. at 500.

Petitioner's last minute attempt in its motion for rehearing to raise an equal protection claim does not, and cannot, qualify as an adequate state presentation of that claim sufficient to invoke this Court's jurisdiction. "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing comes too late, unless the court actually entertains the question and decides it." *Herndon v. Georgia*, 295 U.S. 441, 443 (1935). *Accord, Hanson v. Denckla*, 357 U.S. 235, 244 (1958); *Radio Station WOW Inc. v. Johnson*, 326 U.S. 120, 128 (1945); *American Surety Co. v. Baldwin*, 287 U.S. 156, 163 (1932); *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919); *McCorquodale v. State of Texas*, 211 U.S. 432, 437 (1908).

Nothing had prevented petitioner from presenting its constitutional claim in a timely manner. Because petitioner was faced with an appellate dead end when the Supreme Court of Ohio did not entertain its motion for rehearing, it was no doubt ill-advised in keeping that claim in reserve. Moreover, it cannot be said that the equal protection issue arose only after an unanticipated ruling of the Ohio courts made rehearing the first opportunity to raise the issue. *See Herndon v. Georgia, supra*, 295 U.S. at 443-44; *Aiken Industries, Inc. v. Estate of Wilson*, 383 A.2d 808 (Pa. 1978), *cert. denied*, 439 U.S. 877 (1978) (Blackman, *J.*, concurring). Indeed, petitioner was well aware of its argument throughout the proceedings, for it had referred to the federal equal protection clause fleetingly in its arguments to the trial and intermediate appellate courts. The general rule accordingly applies, and petitioner is foreclosed from now asserting any argument arising out of the Fourteenth Amendment's equal protection clause. With no federal question available for review, this Court should deny the petition.

II. No Court Has Recognized the Constitutional Right Asserted by Petitioner.

Petitioner has attempted to create a constitutional right where none exists. Its first two contentions regarding the Supreme Court of Ohio's limitations of equal protection rights by city limits and waiver presume that a municipality actually has Fourteenth Amendment equal protection rights against another municipality. Such a presumption is indeed bold and notable. No court has ever held that there is such a right, and the decisions addressing the question have all held to the contrary. Having been built on a nonexistent foundation, the entire petition is unsupportable and devoid of merit. There is no reason for this Court to entertain a question as to which there is no history of doubt.

In asserting its constitutional claim, petitioner has overlooked the debilitating fact that, as a subdivision of the State of Ohio, it cannot obtain Fourteenth Amendment protection against its creator state. It has long been held that "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933). *Accord, Trenton v. New Jersey*, 262 U.S. 182 (1923); *Newark v. New Jersey*, 262 U.S. 192 (1923). This limitation has been uniformly followed by the lower federal courts. *See, e.g., Delta Special School District No. 5 v. State Bd. of Education*, 745 F.2d 532, 533 (8th Cir. 1984); *City of Moore v. Atchinson, Topeka & Santa Fe Railway Co.*, 699 F.2d 507, 511-12 (10th Cir. 1983); *Appling County v. Municipal Electric Authority of Georgia*, 621 F.2d 1301, 1308 (5th Cir.) (*per curiam*), *cert. denied*, 449 U.S. 1015 (1980); *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973).

The principle preventing a municipal corporation from invoking the protection of the Fourteenth Amendment against the state similarly prevents a municipality from asserting such rights against another subdivision of the same state. The federal courts of appeal have consistently foreclosed a political subdivision of a state from challenging the acts and ordinances of any political subdivision in the same state on either due process or equal protection grounds. *See, e.g., South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500, 505 (6th Cir. 1986); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049, 1051 n.1 (5th Cir. 1984); *Village of Arlington Hts. v. Regional Transportation Authority*, 653 F.2d 1149, 1153 (7th Cir. 1981); *City of South Lake Tahoe v. California Tahoe*, 625 F.2d 231, 233 (9th Cir. 1980), *cert. denied*, 449 U.S. 1039 (1980). For instance, the Court of Appeals for the Fifth Circuit in *Rapides Parish Police Jury, supra*, ruled that the town of Ball had no standing to assert that the parish's tax allocation formula contravened the Fourteenth Amendment. *Id.* at 1051 n.1. In *South Lake Tahoe, supra*, the Court of Appeals for the Ninth Circuit similarly held that the plaintiff city lacked standing to challenge on Fourteenth Amendment grounds a neighboring city's zoning plans and ordinances. *Id.* at 233.

The inability of a political subdivision to assert rights guaranteed by the Fourteenth Amendment against either its parent state or political siblings is a function of our constitutional federalism. The Fourteenth Amendment simply does not restrict or guide a political subdivision of a state in its dealings with another subdivision. "The relationship between the entities is a

matter of state concern; the Fourteenth Amendment protections and limitations do not apply." *South Macomb Disposal Authority, supra*, 790 F.2d at 505.

Petitioner's failure to cite any authority directly supporting its contentions is understandable, yet rather than recognize its position for what it is—namely a very novel one unsupported by existing law—petitioner has brazenly attempted to convince the Court that an established right has been violated. As the authorities demonstrate, however, petitioner has no equal protection rights as against respondent. Petitioner is a governmental entity, and as a county it is a subdivision of the State of Ohio. Further, as Ohio's only "charter county," petitioner has invoked the state's constitutional authorization to become a municipal corporation (App. at A4). The law is neither ambiguous nor uncertain that a municipality has no Fourteenth Amendment protection vis-a-vis another municipality. Thus, petitioner cannot invoke the equal protection clause against respondent. Consequently, there is no federal question before this Court, and the Court should deny the petition.

III. The Decision of the Court Below Does Not Conflict with Prior Decisions of This Court.

Petitioner has cited a number of decisions from this Court and state courts which are supposedly in conflict with the decision below by the Supreme Court of Ohio. Even a cursory examination reveals that there is no such conflict.

Petitioner relies on two prior decisions of this Court in arguing that the Ohio court has rewritten constitutional law: *Cuyahoga River Power Co. v. City of Akron*, 240 U.S. 462 (1916); *Metropolitan Life Ins. Co. v.*

Ward, 470 U.S. 869 (1985). Even assuming *arguendo* that petitioner's description of the Ohio court's disposition of this case is accurate,[2] those two decisions are inapposite and present no conflict of authority.

Cuyahoga River Power Co., supra, stands for the unremarkable proposition that a municipality's appropriation of a private corporation's property is subject to the Fourteenth Amendment. The Court did not address the use of the Fourteenth Amendment by one municipal corporation against another, nor did it consider whether any protections were offered by the equal protection clause to a municipality. Indeed, the decision did not even turn upon the equal protection clause.

In *Metropolitan Life Ins. Co. v. Ward, supra*, this Court was confronted with a state tax which discriminated against nonresidents. The rights of nonresident individuals were pitted against the right of the state to promote in-state business. By way of distinction, rights of individuals are not at issue in this case, nor is there any allegation of discrimination between residents and nonresidents of a state. Rather, the controversy stems from the rate disparity between two municipalities located outside the boundaries of their supplier municipality, but all three are located within the same state. There can be no question that the authority of a state to tax residents of a different state and a municipality's authority to sell water to a neighboring municipality at agreed upon terms are vastly dissimilar exercises of legislative power.

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[2] As emphasized elsewhere in this brief, the Ohio Supreme Court did not address the Fourteenth Amendment; therefore any express conflict is impossible.

The three state supreme court decisions cited by petitioner are similarly irrelevant to the present controversy. The courts in *City of Texarkana v. Wiggins*, 246 S.W.2d 622 (Tex. 1952), *Hansen v. City of Buenaventura*, 729 P.2d 186 (Cal. 1986), and *Water Works Bd. of Birmingham v. Barnes*, 448 So. 2d 296 (Ala. 1983), all dealt with the propriety of rates charged by municipal water suppliers, but they addressed the rights of individuals only, not the rights of one municipality against a second municipality. None of those decisions involved the implications of a written contract between two municipal corporations for the sale of water. More importantly, *Texarkana v. Wiggins* and *Water Works Bd. v. Barnes* are particularly useless here because they are not premised on the Fourteenth Amendment. Both cases are merely common law utility rate cases and offer petitioner no support in its assertion of equal protection guarantees.

IV. The Decision of the Court Below Does Not Present an Unresolved Issue Concerning the Breadth of Fourteenth Amendment Protection.

Petitioner claims that there is a split among the circuits as to whether a political subdivision of a state has Fourteenth Amendment protection against another political subdivision and that the Court must address this unresolved issue. In truth, the issue is well-settled, and there is no decisional split among the courts of appeals.

Petitioner argues that *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986), conflicts with *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (2d Cir. 1968). The Court of Appeals for the Sixth Circuit held in *South Macomb* that

a municipality has no rights pursuant to the Fourteenth Amendment vis-a-vis another municipality in the *same* state. The Court of Appeals for the Second Circuit held in *River Vale* that a *New Jersey* municipality could assert a Fourteenth Amendment due process claim against an abutting *New York* municipality.

Contrary to petitioner's contention, *River Vale* and *South Macomb* are obviously harmonious. The holding of *River Vale* follows from the fact that the two cities were not created by the same state. *River Vale* explicitly acknowledges and distinguishes the principle that a political subdivision cannot assert Fourteenth Amendment rights against its creator state or, by implication, another political subdivision within the creator state. Petitioner's own quote from *River Vale* makes this abundantly clear (403 F.2d at 686):

> Appellees urge that because the township is a political subdivision of the state it cannot assert rights under the due process clause, citing several cases from the Supreme Court and one from this court. None of these cases is in point. In each of them, a municipality was challenging a law of its own state.

CONCLUSION

It is apparent that petitioner's claims do not warrant or qualify for the Court's consideration. Petitioner has raised arguments to which the answers are long settled. Moreover, petitioner's equal protection claim is simply an untimely attempt to reopen a matter conclusively decided by the Supreme Court of Ohio on state law grounds. This Court is not in a position to hear a federal question never presented to the state court from which the appeal would be taken. The Court should accordingly deny the petition.

Respectfully submitted,

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APPENDIX

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE COURT OF COMMON PLEAS

(Filed November 8, 1982)

No. CV 81 4989

IN THE COURT OF COMMON PLEAS

FAIRWAY MANOR, INC.,
Plaintiff,

v.

BOARD OF SUMMIT COUNTY COMMISSIONERS and CITY OF AKRON,
Defendants.

Pursuant to the request of Summit County for written findings of fact and conclusions of law, the Court hereby promulgates the following:

Findings of Fact as to the Third Party Complaint of the City of Akron against the County of Summit:

1. A contract for the sale of water was entered into by the parties in May, 1979.

2. On or about January 10, 1981 the County placed into an interest bearing account those funds due the City for a quarterly water payment under the terms of the contract in the amount of $232,877.08.

3. The City at all times after the signing of the contract provided and continues to provide water to the County.

4. The County has paid all subsequent quarterly bills to the City.

Findings of Fact as to the Counterclaim of the County against the City:

1. In 1972 the City and County entered into a contract to supply water, and the County developed a water delivery system.

2. In 1977, the City of Akron gave notice of termination of the contract with the County.

3. A process of negotiation for a new contract took place over a period of two years, during which at least nine draft agreements were produced.

4. The County had no alternative sources for the purchase of water.

5. Both the City and the County were represented at each negotiation session by persons qualified and competent to make informed decisions regarding the form and substance of any contract for the sale of water.

6. The County was not forced to sign the 1979 water agreement against its will or better judgment.

7. The City of Akron charges a substantially higher rate for the sale of water to the County of Summit than it charges for the sale of water to the City of Tallmadge.

8. The City of Tallmadge has no contract with the City of Akron for the supply of water.

9. City of Akron officials reasonably believed that the City of Tallmadge might develop its own source of water at some point in the future.

10. The City of Akron engaged in no unscrupulous, excessive, or immoderate conduct in the negotiation or enforcement of the subject contract.

11. The rates charged by the City of Akron to the County of Summit for water are not unreasonable.

12. The provision of water by the City to the County constitutes consideration for the contract in question.

13. Neither the City nor the County at any time during the process of negotiation of the subject contract sought to have included a pre-termination hearing requirement.

14. The City has not overcharged the County for metering services at a pump station.

Conclusions of Law based upon the facts are:

1. The elements necessary to prove a breach of contract have not been proven by the City.

2. The water contract of 1979 is not ambiguous.

3. The contract was not entered into under duress by either party.

4. No illegal discrimination in the rates charged by the City of Akron to the City of Tallmadge when compared to the rates charged by the City to the County was proven at trial.

5. Neither the negotiation process or the contract itself are unconscionable.

6. The contract is supported by valid consideration.

7. No provision in the contract is violative of due process requirements.

8. The withheld quarterly payment must be paid by the County to the City with all accrued interest.

DONALD B. MCFADDEN
Judge

CHARTER OF THE COUNTY OF SUMMIT

[SEAL]

Adopted November 6, 1979
Amended November 3, 1981
Amended November 6, 1984

CHARTER OF THE COUNTY OF SUMMIT

PREAMBLE

The citizens of Summit County, Ohio, believing that they can better govern themselves on the county level, avail themselves of the opportunity afforded by the Constitution of the State of Ohio to adopt this Charter.

ARTICLE I

Corporate Powers, Rights and Privileges

Section 1.01. Names, Boundaries and Powers

The County of Summit, as its limits now are, or hereafter may be, shall be a body politic and corporate by the name of County of Summit with all the rights granted by this Charter and by general law.

The County is responsible for the exercise within its boundaries of all powers vested in and the performance of all duties imposed upon counties and county officers by law. In addition, the County may exercise all powers specifically conferred by this Charter or incidental to powers specifically conferred by this Charter and all other powers which the Constitution and laws of Ohio now or hereafter grant to counties to exercise or do not prohibit counties from exercising, including the concurrent exercise by the County of all or any powers vested in municipalities by the Ohio Constitution or by general law.

All powers shall be exercised and enforced in the manner prescribed by this Charter, or, when not prescribed herein, in such manner as may be provided by ordinance or resolution of the County Council, and, when not prescribed by the Charter or amendments therein or by ordinance or resolution, then such powers shall be exercised in the manner prescribed by general law.